No. 90-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Petitioner Barbara Hafer, Auditor General of the Commonwealth of Pennsylvania, hereby files a Supplemental Brief to bring to the Court's attention the following matters:

1. SUBSEQUENT AUTHORITY

On July 23, 1991, the Court of Appeals for the Sixth Circuit issued an opinion in the case of *Ritchie v. Wickstrom, et al.*, No. 90-2280. The opinion has not yet been reported and a copy is attached hereto as Appendix A.

Ritchie was a civil rights action under 42 U.S.C. §1983 instituted by a state prisoner against a correctional officer and a prison administrator to recover damages for personal injuries allegedly caused by the improper closing of a cell door and

subsequent inadequate medical attention. The District Court granted summary judgment in favor of the individual defendants on the grounds that plaintiff's claim was barred by the Eleventh Amendment. On appeal, the Court of Appeals disagreed with the District Court's determination as to the Eleventh Amendment, but affirmed on the ground that the record showed no conduct by defendants in violation of the plaintiff's civil rights.

Although deciding that *Ritchie* was an "individual capacity" action against the state officers, the Court of Appeals reaffirmed its prior decision in *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990) that an action against state university officers for unlawful dismissal from state university was an "official capacity" not an "individual capacity" action, because the defendants were *acting* in their "official capacities."[1] In distinguishing *Cowan* from *Ritchie*, Judge Guy, who wrote both opinions, emphasized that in discharging Cowan, the individual defendants in that action, "were merely carrying out state policy, and as such, the suit was no different than if it was brought solely against the state." Appendix A, p. B-6. The *Ritchie* opinion is thus consistent with petitioner's position herein, as stated at pp. 5-8 of Petitioner's Reply Brief, that conformity with state policy is one of the factors to be considered in determining whether a state officer is *acting* within his or her "official capacity" and therefore not a "person" under 42 U.S.C. §1983.

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1. In Cowan, the Court of Appeals relied on its prior decision in Rice v. Ohio Department of Transp., 887 F.2d 716 (6th Cir. 1989), vacated and remanded, 110 S.Ct. 3232 (1990). [Petitioner's Petition for Certiorari and initial Brief herein did not cite the subsequent history of Rice. That omission was corrected in petitioner's Reply Brief.] Rice was remanded by this Court to the Court of Appeals for reconsideration of its determination that the failure to promote a state employee for political reasons was constitutionally permissible in light of this Court's decision in Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990). The Court of Appeals for the Sixth Circuit, by its continued reliance upon Cowan, apparently agrees with petitioner's position herein (Reply Brief for the Petitioner, p. 10 n. 17) that this Court's disposition of Rice did not affect the alternative holding by the Court of Appeals in that case that the individual defendants, although sued "in their official and personal capacities," were acting in their official capacities and were thus not "persons" under 42 U.S.C. §1983.

2. CORRECTIONS TO JOINT APPENDIX

In preparing for oral argument, errors have been found in the Joint Appendix in connection with the reproduction of one of the documents filed in the District Court by respondents in opposition to petitioner's Motion for Summary Judgment (Transcript of Debate between Donald Bailey and Barbara Hafer).[2] Corrected Joint Appendix pages JA-183 and JA 187-189 are included herein in Appendix B.

Respectfully submitted,

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2. In addition, the references at p. JA-6 of the Joint Appendix to the pages of the Petition for Certiorari where the Order of the United States Court of Appeals denying Petition for Rehearing and Order of the United States District Court for the Eastern District of Pennsylvania granting Motion for Summary Judgment were reproduced are incorrect. The correct references are A-33 and A-35, respectively.

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-2280

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY RITCHIE,
Plaintiff-Appellant,

v.

MICHAEL WICKSTROM,
THEODORE W. KOEHLER,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Michigan

Decided and Filed July 23, 1991

Before: GUY and NORRIS, Circuit Judges, and FRIEDMAN, District Judge.*

RALPH B. GUY, JR., Circuit Judge. Plaintiff, Harry Ritchie, appeals from a decision by a magistrate judge[1] to grant the defendants' motion for summary judgment. The magistrate judge concluded the defendants' claim that this suit was barred by the eleventh amendment was well-founded.[2]

*The Honorable Bernard A. Friedman, United States District Court for the Eastern District of Michigan, sitting by designation.

1. On April 2, 1990, the parties filed a consent order of reference allowing the magistrate judge to make a final disposition in this case.

2. The magistrate judge, in a report to the district judge, had earlier recommended that a motion for dismissal or summary judgment be denied. The district judge adopted the report and recommendation of the magistrate judge. The eleventh amendment claim was not implicated until a second motion for dismissal or summary judgment was filed by the defendants.

Upon a review of the record, we reject the magistrate judge's eleventh amendment analysis, but affirm the dismissal on other grounds.

I.

The facts can be simply stated and essentially are not in dispute. The plaintiff was an inmate at the Marquette state prison, an institution within the correctional system of the State of Michigan. On October 5, 1985, plaintiff's leg was injured when it was caught in the cell door that was being automatically closed by defendant Wickstrom, a correctional officer at the Marquette facility. Although Ritchie was taken to first aid, there appeared to be no injury of consequence. There was no swelling and the skin was not broken. He was seen two days later and no problems were noted. At the end of the month, Ritchie came into the clinic and requested return to work status, indicating that there was noting wrong with his leg. His request was granted. The following month, however, Ritchie began complaining of left leg pain. Plaintiff was seen by prison medical personnel on October 31 and November 15, 1985. Examination did not reveal any deformity or swelling, or a significant limp. There was full range of motion in the knee, but on full extension the knee appeared to snap into place. A meniscal tear was ruled out and notes reflect that an x-ray was to be obtained.

There are no further progress notes until March 15, 1986, when plaintiff again began complaining of left leg discomfort. On March 18, the following notation appears:

> Patient is still complaining of pain in his left knee which he has had for some time. He was referred to the orthopedic surgeon several months ago, but apparently has not yet been seen. There has been a backlog of orthopedic patients due to the fact that the orthopedic surgeon broke his ankle, and is only now "catching up." Patient advised that we will make certain that he is definitely seen on the next orthopedic consult visit. We will also renew his Ecotrin to be used for prn pain.

On April 10, Dr. Lyons examined plaintiff. He offered only a recommendation of physical therapy. Plaintiff was subsequently transferred to Jackson state prison where he received an orthopedic consultation. On October 22, 1986, a left knee arthroscopy was performed.

A March 17, 1987, report from a Dr. Mishra states:

> This gentleman was injured about 1985 in Marquette when he claims that his leg was slammed against a door. At that time he was scoped and was found to have a possible tear of the anterior cruciate ligament and lateral meniscus with nothing done at that time. He never got better. He still had locking and giving out and it has now come to a point that he cannot even walk without it locking.
>
> Examination shows that the patient has a very tender lateral and medial joint, anterior is 2+ and Lochman is 2+ positive. Internal rotation causes severe pain.
>
> Neurovascular status and x-rays are normal.

He was diagnosed as having a torn lateral meniscus, and Dr. Mishra suggested another arthroscopy with possible removal of the lateral meniscus.

In March 1988, plaintiff filed this lawsuit alleging negligent injury and a 42 U.S.C. §1983 claim for deliberate infliction of injury and deliberate indifference to medical needs.[3]

II.

A proper analysis of this case calls into play the interpretation, or perhaps misinterpretation, of several earlier decisions by this court involving eleventh amendment immunity and the differences between a suit against defendants in their "individual capacity" and their "official capacity." Also implicated are the Supreme Court decisions which our court interpreted and applied.

---

3. The federal suit was started only after an earlier suit filed in the Michigan Court of Claims was dismissed on the basis of the court having no jurisdiction over the individual defendants.

Our analysis begins with *Brandon v. Holt,* 469 U.S. 464 (1985), which arguably started the confusion in "official capacity" lawsuits. In *Brandon,* a section 1983 action was brought against a police officer for assault. The Director of the Police Department was also sued in his "official capacity." The city was not named as a defendant because, and this is important, the complaint was filed before the decision in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), overruled *Monroe v. Pape,* 365 U.S. 167 (1961). Under *Monroe,* cities could not be defendants in section 1983 actions. Thus, in an effort to get a "deep pocket," the plaintiff in *Brandon* sued the Director in his official capacity. A public official is only a "deep pocket," however, if the governmental unit will pay the judgment. This may or may not occur. In order to provide the plaintiff in *Brandon* with the "deep pocket" he would have had post-*Monell,* the Supreme Court simply declared that a suit against a public official in his "official capacity" is a suit against the governmental unit.

What goes around comes around, however, and the "deep pocket" feeling of euphoria felt by plaintiffs post-*Brandon* was dampened somewhat when the Supreme Court issued its opinion in *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989).[4]

In *Will,* the Supreme Court determined that states are not "persons" within the meaning of section 1983 and that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against . . . the State itself." *Id.* at 71 (citations omitted).

Also relevant is the decision in *Kentucky v. Graham,* 473 U.S. 159 (1985), which was decided before *Will* but after *Brandon.* In *Graham,* the Court stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55 (1978). . . .
>
> On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under §1983 only when the entity itself is a " 'moving force' " behind the deprivation; thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

473 U.S. at 165-66 (citations omitted).

Consideration of two other cases is necessary to complete the legal backdrop. In *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986), the Supreme Court made it clear that pleading labels do not control when the issue is the "capacity" of the defendant:

> The first paragraph of the complaint alleged that the action was brought against the defendants "in their individual and official capacities." There is, however, nothing else in the complaint, or in the record on which the District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity.

Id. at 543. The Court went on to disregard the "individual capacity" designation.

In *Cowan v. University of Louisville School of Medicine,* 900 F.2d 936 (6th Cir. 1990), we dismissed claims against individual defendants, holding that the claim was an "official capacity" claim and, thus, was really an attempt to collect money damages against the University of Louisville, which, as a state agency, had eleventh amendment immunity. The decision in *Cowan,* of which I was the author, is being misinterpreted by the defendants. The defendants read the decision much too broadly. The defendants' reading of *Cowan* is exactly what Judge Wellford feared in his prescient concurrence.

4. *Will,* of course, is applicable only when a state and its officials are sued.

In order for a person to be sued in a section 1983 action, he must be acting under color of law. Historically, many plaintiffs pleaded the element of "color of law" by stating a defendant was acting in an "official capacity," because it follows *ipso facto* that one acting in an official capacity for a governmental unit is acting under color of law. It is only recently that this method of pleading the "color of law" element has become a problem. *Cowan* does not stand for the proposition that every time a state official is charged with misconduct while acting within the general ambit of his job title eleventh amendment immunity comes into play. All that was intended in *Cowan* was to indicate that in that case the two individual defendants were merely carrying out state policy and, as such, the suit was no different than if it was brought solely against the state.

When the foregoing is used as the analytical tool to evaluate plaintiff's claim in the case at bar, it becomes instantly clear that the suit against corrections officer Wickstrom is an "individual capacity" suit not subject to eleventh amendment protections.[5] Similarly, we believe the suit against Koehler is an "individual capacity" suit, notwithstanding that no "hands on" misconduct is claimed. Koehler is sued as the policy maker for the institution. *See, e.g., Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). A judgment against Koehler would not be a judgment against the State, and the State would not be compelled to reimburse Koehler or pay the judgment. If the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement, this would *not* change the analysis. We thus reverse the decision to dismiss on eleventh amendment grounds. We nonetheless, however, conclude that this case should be dismissed on other grounds. We are free to affirm on an alternate basis. *Herm v. Stafford,* 663 F.2d 669 (6th Cir. 1981).

On the state of the record before us, we conclude that the only wrongful acts that possibly could be attributed to defendant

5. We do not find this holding to be inconsistent with *Wells v. Brown,* 891 F.2d 591 (6th Cir. 1989), when *Wells* is read against the clear mandate of the relevant Supreme Court decisions.

Wickstrom are acts of negligence. Negligence will not ground a section 1983 action. *Daniels v. Williams,* 474 U.S. 327 (1986).

As to defendant Koehler, the plaintiff has failed to refute properly the affidavits of record, which indicate that Koehler was not responsible directly or indirectly for the medical treatment, or lack thereof, received by Ritchie. We view this as a case in which a plaintiff, having struck out in the state court of claims, now vainly tries to turn his negligence case into a federal constitutional claim. Nothing that occurred here rises to the level of a constitutional violation. We therefore AFFIRM the judgment of the magistrate judge.

[JA-183]

Kate: "Your time for answering that is up. Mr. Stoffer, you have a question then for Mr. Bailey."

Stoffer: "I guess, following that train of thought, with the history in your department under the prior administration of job selling and macing perhaps, why did you not simply make a clean break, especially in light of the fact that such things as macing may not be spoken, but may be implied by innuendoes to employees. Why not just make a clean break and say 'I will accept no contributions from employes of the Auditor General's Department'?"

Bailey: "Harry, if someone wants to make a contribution, and it's a voluntary contribution, there is no reason why those contributions should not be accepted. Mrs. Hafer has done so, she has admitted publicly that she has. Virtually every person in office that I know of has done so, or accepted voluntary contributions.

Those charges, incidentally, that occurred during the prior administration have absolutely nothing to do, and the U.S. Attorney has made it very, very clear, that the, uh, in no way do any of those difficulties touch in any way, and he has publicly stated this, uh, on me. And I am very proud of the fact that we have just turned in an absolutely remarkable job of administration and effectiveness during my tenure. And the difficulty with this campaign, and the very sad part about it, is that a relative and meaningful discussion of substantive issues for the benefit of the public to evaluate a campaign has been . . . . And I think that substantive . . . important issues in the campaign, . . . when they touch on things of . . . public, should be focused on. . . . things that you have mentioned . . . occurred five and six and seven and eight years ago and have absolutely nothing to do, and have never had anything to do with the fine job that we have turned in for the public as Auditor General of the Commonwealth of Pennsylvania."

Kate: "O.K. Mr. Bailey. Thank you. Mrs. Hafer, your response."

Hafer: "Don, that simply is not true and you know it. Let's stick to the facts. The fact is, your Chief Deputy, Harold Imber, is in jail for what . . . racketeering and job selling. Two other people under the Benedict administration are in jail for what . . .

[JA-187–189]

need someone that knows how to practice professionally, high standards, integrity. And with a history as a County Commissioner in the second largest county in the Commonwealth, I have a budget of $440,000,000,000 and 8,000 employees. I am not only qualified, the Press and Post Gazette and the Tribune Review have said that I am the best qualified."

Kate: "Mr. Bailey."

Bailey: "Well, I think that maybe the best evidence is the kind of job performance that you have turned in as a Commissioner. Thelma Shroeder was an appointee of yours out there at the prison, the jail. You are chairman of the Prison Board. Two people are dead today, while you were running around the state campaigning for Lt. Governor. Law suits were filed in May. What responsibility did you perform. Apparently none. Now let's go back to Jeannette. That was not an audit. That was information that we gave to investigators. And it's no secret that I opposed Mr. Driscoll for incompetence and for not doing his job when he ran for District Attorney. But even he admitted publicly that close to $3,000 in hot dogs, or missing food or money was gone. Money representing 20 to 30 percent of the profits of a school activity fund. I think that's wrong. Your references to Carbon County are just plainly and simply totally false, baseless and without foundation and fact."

Kate: "Harry Stoffer you have your question for Mr. Bailey."

Stoffer: "Mr. Bailey, last week you disclosed the results of your investigation into the 20 names that had been given to you by the U.S. Attorney's office, you said that you couldn't do anything about two of them because they had been ordered reinstated by an arbitrator. I understand that in another case you have appealed an arbitrator's decision to the state Supreme Court over an employee who put in for $14 too much in expense reimbursement. Uh, don't you have a case of misplaced priorities here, and does this second case not smack of some vindictiveness against an employee who came up with some audit results you didn't like?"

Bailey: "No it does not, Harry. First of all, I don't have the authority to appeal an arbitrators' decision that's years old. I

[JA-187–189]

can't do it. So the premise of your question is simply incorrect. Secondly, the reason that we, in fact, are appealing the other case is because it is something that occurred during my administration and we are bound and determined to see that the law is enforced. There is no inconsistency at all. I am powerless in the first two cases. And incidentally, on those 20 names, isn't it time to be honest with the public. The press core, myself, even my opponent honestly knows that the U.S. Attorney has said that I cannot in, there is no way that I can reveal those names. He can't reveal them. I can't reveal those names. He knew that when they were referred. And all of that information that we requested and that we helped with and that we investigated on our own initiative, we weren't asked, we weren't challenged, we did it because we believed it was the right and proper thing to do, is five and six and seven and eight years old. And the majority of those people, these notes and names that were gleamed from reports, none of those people had been investigated, there was no attempt to charge them in wrongdoing, they were names that needed to be checked out. And you know, we need to respect people's rights and we need to conduct ourselves in accordance with responsibility. We were prompt, we were thorough, we were complete and very decent and open and nonpolitical about it and that's what we are going to continue to do."

Kate: "O.K. Mrs. Hafer."

Hafer: "Don, that is simply not true. The truth really isn't in you. Those 20 names were given to you by Jim West at your request. I have the letter, the transmittal letter. I talked to Mr. West last week. He said not only did he give you the information, he gave you specific instructions to proceed with the investigation and punish those people as you saw fit. You were the only one who has the names that can release them. You are absolutely right, the FBI won't release those names. You are the ones that should release those names. You are the ones that wanted the list. You were given the list in January and again instructed in July to clean house. Nine months is not timely. It is a continuation of those, uh, the corruption of the previous administration. You not only, those people bought their jobs, you make them keep paying."

[JA-187–189]

Kate: "O.K. Mrs. Hafer and Mr. Bailey, I am going to exercise my moderators' prerogative now to ask a few questions in the time remaining. You will each have a minute and 15 seconds to respond to these questions and I will direct my first question to Mrs. Hafer.

Following up on what you just said, if you were elected Auditor General, what would you do to, uh, remove that some people see as a remaining cloud over the Department, considering the fact that it's known that there are these 20 people?"

Hafer: Well, one of those people are now in jail, Harold Imber, uh, on that list. But let me just tell you what I would do, and I would talk, and I have already talked with the U.S. Attorney about this, when I am Auditor General I will investigate and fire those people. There will be no job selling, no corruption and no macing in Hafer's administration. It is unbelivevable that in Pennsylvania that we have a history of macing and job selling. That went out years ago, years ago. Yet we have a fellow that is supposed to be of the highest standard, and his predecessor, his colleague, they had joint fundraisers together in '84 continuing, we have Don Bailey continuing the corrupt practices of the last administration, He and Al Benedict are cut out of the same bolt of cloth. There is corruption in that office. I am going to investigate and I am going to fire those people."

Kate: "Mr. Bailey."

Bailey: "Yeah, first of all, what Barbara has said is totally and completely false. Now we have set up an entire new standard of ethics in the office, we wrote that into the office when I came into the office. The information that she is talking about are charges made against people, some of them unjustified, incidentally, that were, goes back five and six and seven years ago. Barbara has just made my day. The fact that she has discussed these issues with the U.S. Attorney itself raises a number of serious questions. She is also incorrect in that the U.S. Attorney does have the freedom, if he would like, to certainly, to release those names. In fact, he has commented to the press that he can do so. One must wonder why, if those two were talking and/or working together, why this list was ever floated to the press to begin with. When we did check these people out, we found that half of these people had absolutely no